

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 20, 2017 appellant, then a 48-year-old dental assistant, filed an occupational disease claim (Form CA-2) alleging that exposure to hazardous noise, while in the performance of duty, had worsened his preexisting binaural hearing loss.

In a report dated April 28, 2017 and finalized May 3, 2017, Dr. Jackson R. Holland, a Board-certified otolaryngologist, noted appellant's 20-year history of binaural hearing loss with tinnitus. He noted that appellant had worn binaural hearing aids since 2009, which were awarded in a state workers' compensation claim.² Dr. Holland described appellant's occupational noise exposure to dental hand pieces and suction devices while a dental assistant in military service from 1988 to 1992, in private practice from 2000 to 2014, and commencing in 2015 at the employing establishment. Appellant had also worked as a roofer from 1993 through 1999, and had been exposed to noise from staple guns, air compressors, hydraulic lifts, and industrial production equipment. Dr. Holland diagnosed "bilateral neurosensory" hearing loss, bilateral noise-induced hearing loss, and tinnitus. He opined that the pattern of progressive hearing impairment demonstrated by audiometric test results from September 1996 through April 24, 2017 was a neurodegenerative, genetically-based process unrelated to occupational noise exposure. Dr. Holland noted that improvements in dental equipment had reduced the decibel volume of apparatus output.

By development letter dated October 12, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary information.

In response, appellant submitted an October 31, 2017 statement in which he noted a state workers' compensation agency had previously found his hearing loss to be age related.

The employing establishment controverted the claim in a November 9, 2017 statement, contending that appellant's federal duties since he commenced employment on November 30, 2015 had not exposed him to hazardous noise. Appellant's position did not require hearing protection nor his participation in annual audiometric testing.

A July 2016 industrial hygiene survey of Dental Clinic Two found intermittent noise from 64 to 93 decibels in the prosthetics laboratory from polishing, sanding, and grinding equipment. The employing establishment provided foam earplugs, which reduced exposure to less than 85.

On February 15, 2018 OWCP obtained a second opinion regarding the etiology and severity of appellant's hearing loss from Dr. Julie Gustafson, a Board-certified otolaryngologist. Dr. Gustafson reviewed the medical record and a statement of accepted facts. She noted clinical findings and obtained audiometric test results. Dr. Gustafson diagnosed sensorineural hearing loss

² It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes, which have varying standards for establishing eligibility for benefits. *P.S.*, Docket No. 18-1789 (issued April 11, 2019); *J.D.*, Docket No. 18-0101 (issued August 27, 2018); *J.F.*, 59 ECAB 331 (2008); *Ernest J. Malagrida*, 51 ECAB 287 (2000).

of unknown or genetic etiology, tinnitus, and a history of noise-induced hearing loss. She opined that appellant's noise exposure at the employing establishment's dental clinic was not of sufficient level or intensity to have caused or contributed to noise-induced hearing loss. Also, audiometric evaluations had not demonstrated a significant progression as would be expected with noise-induced hearing loss.

By decision dated March 27, 2018, OWCP denied appellant's claim, finding that causal relationship had not been established. It accorded Dr. Gustafson's opinion the weight of the medical evidence.

On April 30, 2018 appellant requested reconsideration, contending that occupational noise exposures had worsened preexisting hearing loss. He submitted audiograms dated September 24, 1998, June 15, 2009, March 25, 2016, April 24, 2017, and February 15, 2018.

By decision dated June 27, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b), will be denied by OWCP without review of the merits of the claim.⁵

³ *Id.* at § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ *Id.* at § 10.608.

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's timely request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The audiometric test reports submitted on reconsideration are irrelevant to the underlying merit issue of whether appellant established exposure to hazardous noise while in the performance of duty. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁶ Consequently, appellant was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board thus finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit pertinent new and relevant evidence not previously considered. As appellant did not meet any of the necessary regulatory requirements, he is not entitled to further merit review. Therefore, OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that exposure to hazardous noise during the performance of his federal duties had caused hearing loss and tinnitus. However, this argument pertains to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

⁶ *M.B.*, Docket No. 17-1980 (issued May 14, 2019); *see E.G.*, Docket No. 18-0270 (issued August 24, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board